No. 82-1795

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., *et al.*,
Petitioners,
v.
RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE

The National League of Cities moves the Court under Rule 36 for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support thereof states:

1. The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized by its Bylaws include "the safeguarding of the interests, rights and privileges of municipalities."

2. The case calls upon the Court to determine whether States have authority to prohibit the advertising of wine

on programming transmitted from out-of-state sources over cable television systems. The Court's answer is of major concern to cities because of its potential impact on local regulation of cable systems through the franchise process.

3. NLC wishes to participate in this case in order to provide the Court with a broader understanding of the role of municipalities in the regulation of cable systems and the consequences which its decision could have for such entities. NLC believes that its views can assist the Court in recognizing that the First Amendment standards which apply to State regulation of the content of programming provided over cable systems should not necessarily be applied to local franchise requirements requiring the set aside of channels for access use.

4. Consent has been sought to the filing of this brief *amicus curiae* from all of the parties. Consent was refused by counsel for Cox Cable of Oklahoma City, Inc. et al.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS AND STATUTES:

OTHER AUTHORITIES:

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interests of the National League of Cities are set out in the foregoing Motion.

INTRODUCTION

In almost all cases, cable television systems are constructed in the public rights-of-way. Consequently, a franchise or its equivalent must be obtained from the unit of government, usually a municipal government, which

has authority to grant cable franchises under state law. A franchise is a long-term grant of authority to operate a cable system in the public rights-of-way and the award is generally based on compliance with public service requirements rather than on an auction to the highest bidder. It is thus similar to the award of a broadcast station license by the Federal Communications Commission ("FCC").

A key public service requirement is frequently the set aside of channel capacity for the provision of communications services by public, educational, and governmental users and for the provision of services by commercial users who are not affiliated with the cable operator. The establishment of access requirements through the franchise process is well established. In this Session of Congress, the Senate has passed the "Cable Telecommunications Act of 1983," legislation that would affirm the authority of municipalities to require the set aside of channel capacity for public, educational, and governmental access use and authorize the establishment of additional access requirements, apparently including leased access requirements, through bilateral negotiations.[1]

The House of Representatives has under consideration similar legislation, also entitled the "Cable Telecommunications Act of 1983," which was introduced by Representative Timothy E. Wirth, Chairman of the House Energy and Commerce Committee's Subcommittee on Telecommunications, Consumer Protection, and Finance, on October 6, 1983, that would validate the establishment of certain types of public, educational, and governmental access requirements through the franchise process and establish federal leased access standards.[2]

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[1] *See* S.66, 98th Cong., 1st Sess. (1983), Secs. 606(a), 613(b), and 613(c). The bill was passed by the Senate on June 14, 1983 by a vote of 87 to 9, 129 CONG. REC. S8325-S8326.

[2] *See* H.R. 4103, 98th Cong., 1st Sess. (1983), Secs. 612, 613, and 631(d).

The validity of public, educational, and governmental access requirements has been challenged on First Amendment grounds in a pending lawsuit. In particular, a regulation of the State of Rhode Island requiring the set aside of at least one channel for public, educational, and governmental access use has been questioned.

The issue presented by the petition for certiorari in the instant case is limited to the power of a state, consistent with the First and Fourteenth Amendments, to bar truthful advertising of a lawful product—wine—on programming from out-of-state sources carried over cable television systems.[3]

The petition for certiorari places this issue in the broader context of the First Amendment rights of cable operators (pp. 18-19):

> This case is also important because it is the first case to come before this Court involving the power of the states under the First Amendment to regulate the content of cable television programming. As the number of cable subscribing households has grown from 2.8 million in 1968 to more than 31 million today [footnote omitted], state and local governments have increasingly sought to play a role in the regulation of cable program content. Such regulation raises vital First Amendment questions deeply affecting this increasingly important medium of communication.

Moreover, the petition analogizes cable operators to newspaper publishers for First Amendment purposes (p. 21).

The National League of Cities, which takes no position with respect to the merits of the case, appears here as *amicus* to draw the Court's attention to the access requirements included in numerous franchise agreements

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[3] *Berkshire Cablevision of Rhode Island v. Burke*, C.A. No. 82-0537 P (D.R.I., decided Sept. 15, 1983), finding that the State's access regulations were consistent with the First Amendment.

and to urge that the Court not reach the issue of the legality of these requirements under the First Amendment—the issue presented in *Berkshire Cablevision of Rhode Island, supra*, n.3—in resolving the validity of the Oklahoma ban on the carriage of wine commercials over cable systems.

SUMMARY OF ARGUMENT

The only First Amendment issued raised in the present case is whether the First Amendment bars a state from prohibiting liquor advertising on programming carried over channels of cable systems. The record presented to the Court in this particular case does not address the important separate issue of the applicability of the First Amendment to franchise requirements requiring the set aside of channel capacity for public, educational, governmental, or leased access use. That issue should be specifically reserved.

ARGUMENT

This case presents the First Amendment issues implicated by a state ban on the carriage of wine commercials over cable television systems, including commercials provided over a cable system in conjunction with programming originated outside of the state. The record before the Court does not address the separate issue of the First Amendment's applicability to access requirements established as part of the franchise. That issue should be reserved for later decision.

Each medium of expression "must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952). Because cable television systems are a relatively new medium of communication and because ongoing evolution in cable technology is having a major impact on the nature of communications services provided over cable systems, the

precise First Amendment standards which should govern the relatively new medium of cable television have yet to be established.

Cable television, because it is a hybrid medium, presents special problems for purposes of First Amendment analysis. For example, the Court has determined for certain purposes that cable television is similar to broadcasting. In *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972), the Court ruled that, because cable systems so extensively carry broadcast signals, the FCC had authority to require that cable operators comply with certain provisions of Federal law governing broadcasting, particularly a requirement for locally originated programming. The Court reiterated this view in *FCC v. Midwest Video Corporation*, 440 U.S. 689 (1979), stating that cable television has become "enmeshed in the field of television broadcasting," 440 U.S. at 700. Congress has also applied to cable television the provisions of broadcast law which require equal opportunity for candidates for public office and fairness in the presentation of issues of public importance.[4]

Representatives of the cable television industry, relying primarily on language included in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45-46 (D.C. Cir. 1977), in which FCC rules limiting the types of programming services which could be provided over cable systems were invalidated, and *Midwest Video Corporation v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978), in which FCC regulations requiring the set aside of access channels, based on

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[4] 47 U.S.C. § 315. See also First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201, 219-220 (1969), adopting the rules requiring that cable operators, in conjunction with origination programming, provide equal time for candidates for public office and a reasonable opportunity for the discussion of differing views on controversial issues of public importance, requirements subsequently aodpted by Congress.

the FCC's statutory authority over broadcasting,[5] were found to be ultra vires, have argued that cable operators are telepublishers and, as such, are entitled to the same First Amendment protections as apply to newspaper publishers.[6]

Because of their use of public property (i.e., the public rights-of-way) for the distribution of information to the public, cable operators are more akin to broadcasters, which also use public property (i.e., the airwaves) for the distribution of information than to newspapers, which can operate without using public property. *See Community Communications Company, Inc. v. City of Boulder*, 660 F.2d 1370, 1377-1380 (10th Cir. 1981); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-128 (7th Cir. 1982). Furthermore, it is the view of the *amicus* that a city, when it awards a franchise on the basis of public service requirements, including the establishment of access requirements, is acting in a manner that is consistent with the First Amendment.[7]

The Court's determination in *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), which was reemphasized in *Columbia Broadcasting System, Inc. v. FCC*, 101 S.Ct. 2813 (1981), in the statement that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," 101 S.Ct. at 2829,

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[5] In *Midwest Video Corporation, supra*, 440 U.S. at 709, n.19, the Court declined to decide the First Amendment issues raised by the FCC's access rules, indicating in a footnote, however, that the issue was not "frivolous."

[6] *See* Report of the National Cable Television Association to the Chairman of the Senate Committee on Commerce, Science, and Transportation, *Cable Television, Government Regulations and the First Amendment*, April 1981.

[7] *See Associated Press v. United States*, 326 U.S. 1 (1945); *Berkshire Cablevision of Rhode Island, Inc., supra*; Geller and Lampert, *Cable, Content Regulation and the First Amendment*, 32 Cath. Univ. L. Rev. 603, 622-627 (1983).

is as relevant for access channels on cable television systems as it is for broadcasting. The purpose of access requirements is to diversify the sources of information available to the public, not to restrict the content of programming provided on the cable system's other channels.

For present purposes, it is sufficient to point out the existence of these different issues and the differences between the impact of the Oklahoma law at issue and access requirements included in cable franchises on the operation of cable systems. Access requirements are structural in nature (i.e., content neutral) and designed to diversify the sources of programming provided over cable systems while the Oklahoma law is designed to regulate the content of all programming provided over a cable system. Thus, the record in the present case does not establish a basis for making a decision on the First Amendment issues presented by access requirements included in cable franchises. These issues should not be addressed until a case specifically involving the validity of access requirements is before the Court.

CONCLUSION

For the foregoing reasons, the issue of the validity of franchise requirements requiring the set aside of channel capacity for access purposes under the First Amendment should be expressly reserved.

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